



Attachments

Ordinary Meeting

Notice is hereby given that an Ordinary Meeting of Council will be held at Council Chambers, 1 Belgrave Street, Manly, on:

Monday 19 October 2009

Commencing at 7:30 PM for the purpose of considering items included on the Agenda.

Persons in the gallery are advised that the proceedings of the meeting are being taped. However, under the Local Government Act 1993, no other tape recording is permitted without the authority of the Council or Committee. Tape recording includes a video camera and any electronic device capable of recording speech.

*Copies of business papers are available at the Customer Services Counter at Manly Council, Manly Library and Seaforth Library and are available on Council's website:
www.manly.nsw.gov.au*

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******* END OF ATTACHMENTS *******

Manly Council

DRAFT
Compliance and
Enforcement Guidelines
October 2009

**Environmental Services Division Report No. 24 - Compliance and Enforcement Policy 2009
Compliance and Enforcement Guidelines - October 2009**

Title: Compliance and Enforcement Guidelines

Policy No: MAN-GUID-03

Keywords: Compliance, Enforcement, unlawful activities, breaches of EPAA,
unlawful development

Responsible
Officer: Manager Compliance and Enforcement

1.0 Purpose:

These Guidelines have been formulated to provide a sound and fair basis with respect to how Manly Council, as the responsible authority, acts promptly, consistently and effectively so as to manage unlawful activities with a view to ensuring, so far as is practicable, compliance with the law and, in the case of the carrying out of unlawful development, reflecting the planning objectives of the *Environmental Planning and Assessment Act 1979 (NSW)* (the 'EPAA'), any *Environmental Planning Instrument* (an 'EPI') and the *Local Government Act 1993 (NSW)* (the 'LGA').

Insofar as the carrying out of unlawful development is concerned, s 5 of the EPAA states that the objects of the EPAA are to encourage:

- (i) the proper management, development and conservation of natural and artificial resources, including agricultural land, natural areas, forests, minerals, water, cities, town and villages for the purposes of promoting the social and economic welfare of the community and a better environment;
- (ii) the promotion and co-ordination of the orderly and economic use and development of land;

2.0 What is an unlawful activity:

An **unlawful activity** is the doing of any act, matter or thing, or the carrying out of any activity of any kind, that is:

- contrary to a legislative provision regulating a particular activity or work;
- contrary to an environmental planning instrument that regulates the activities or work that can be carried out on particular land;
- without a required development consent, approval, permit or licence; and/or
- contrary to the terms or conditions of a development consent, approval, permit or licence,

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and includes but is not limited to the carrying out of unlawful development within the meaning of the EPAA and the carrying out of any activity under s 68 of the LGA without the prior approval of Council having been obtained.

The term **development** is defined under s 4 of the EPAA as follows:

'development' means:

- (a) the use of land, and
- (b) the subdivision of land
- (c) the erection of a building;
- (d) the carrying out of a work;
- (e) the demolition of a building or work;
- (f) any other act, matter of thing referred to in s 26 [of the EPAA] that is controlled by an EPI, but does not include any development of a class or description prescribed by the regulations [*Environment Planning and Assessment Regulation, 2000 (NSW)*] (the 'EPAR') for the purposes of this definition.

Note: An 'environmental planning instrument' ('EPI') is any State Environmental Planning Policy, Regional Environmental Plan or the *Manly Local Environmental Plan, 1988* (the 'MLEP').

The **unlawfulness** of any activity is determined objectively by reference to the relevantly applicable legislation. In the case of unlawful development, regard is to be had to the EPAA, the Regulation or any EPI as to whether such development can only be implemented with or without 'development consent'. Unlawfulness is also determined against the criteria of 'Exempt Development' and 'Complying Development' as prescribed by the *Manly Local Environmental Plan, 1988* (the 'MLEP').

3.0 Strategies and Enforcement Actions:

The following strategies and enforcement actions shall be undertaken as they relate to the nature of the unlawful activity encountered:

3.1 Unlawful activity where no development consent or other necessary approval, etc, has been sought or obtained

Retrospective development consent

- 3.1.1 There is no statutory power to enable the Council to grant development consent on a retrospective basis to legitimise or regularise unlawful building works.

Search of records

- 3.1.2 A search of Council's records shall be undertaken to determine the ownership and the development history of the subject land.

Initial inspection and investigation

- 3.1.3 Initial inspection of the land and investigation of the matter shall be carried out by Council officer(s) holding current and appropriate delegated authority.

Assessment of environmental harm and injunctive measures

- 3.1.4 After the initial inspection the objective seriousness shall be assessed and determined in the context of 'environmental harm'. If the nature of the unlawful activity is likely to result in 'irreparable damage' to the environment then immediate injunctive action through the Land and Environment Court of NSW shall be considered in consultation with Council's solicitors.

Cessation of works and an undertaking to submit application

- 3.1.5 If the initial investigation reveals that the unlawful activity poses no likely harm or irreparable damage to the environment, a statutory Notice of Intention to issue an Order (where relevantly available under the particular legislation) shall be sent to the owner or occupier of the land and the person carrying out the unlawful activity within five (5) working days of the initial inspection requiring written undertakings to be provided to Council that the unlawful building work in-situ shall cease forthwith.
- 3.1.6 Failure to stop work and provide the Council with a written undertaking may result in an Order being issued as per the provisions of the EPAA (or other relevantly applicable legislation) or the matter being referred to Council's solicitors for appropriate action.

Re-inspection

- 3.1.7 If a re-inspection after the expiry of an Order reveals that the unlawful activity is still being carried out unabated and no undertakings have been given then the matter shall be referred to the Council's solicitors for appropriate legal action.

Requirement to provide particulars and further information

- 3.1.8 On the basis that the unlawful activity has ceased the owner or occupier of the land and the person in 'control and command' of the works shall submit representations to Council as per the provisions of the applicable legislation inviting such persons to provide full and frank particulars with respect to the intended nature of the works and the reasons why such works were carried out without development consent.
- 3.1.9 As an alternative to, or in conjunction with 5.1.8, a Council officer(s) holding appropriate delegated authority may pursuant to statutory authority conduct a formal interview with

the owner, occupier of the land or person in control and command of the unlawful activity.

3.1.10 In addition to requiring any person to answer questions a Council officer may pursuant to statutory authority require any person to furnish information in relation to the matter the subject of the inspection or investigation.

3.1.11 Pursuant to statutory authority a Council officer may require the owner, occupier and/or person in control and command of the unlawful activity to furnish, within such time allowed, information with respect to the activity. The requirements with respect to such information shall be in accordance with Schedule 1 of this Guideline.

Failure to furnish information

3.1.12 Failure to comply with a request for information within the time allowed, will constitute a breach of the EPAA (or other relevantly applicable legislation) enabling the Council to commence legal action seeking mandatory orders to compel the owner or occupier of the land or person in command and control of the unlawful activity to furnish the information required.

Neighbour notification

3.1.13 On the basis that the unlawful activity has ceased and the required information pursuant to statutory authority has been received a preliminary assessment shall be carried out to determine the likely and perceived impacts caused by the unlawful activity on the occupiers of the immediate adjoining land. If in the opinion of the Council the unlawful activity is likely to have an adverse impact then neighbour notifications letters shall be sent to each affected adjoining occupier seeking comments in relation to the real and perceived impacts of the unlawful activity.

Assessment and enforcement actions

3.1.14 On receipt of any representations, furnished information and any comments from affected neighbours a full assessment shall be carried out to determine an appropriate course of action to remedy the breach of the relevantly applicable legislation. The assessment may result in one or more of the following actions being taken against the owner or occupier of the land or the person in control and command of the unlawful activity:

- a) no further action to be taken;
- b) no further action to be taken subject to certain conditions or statutory obligations being fulfilled;
- c) Class 4 civil enforcement proceedings being commenced in the Land and Environment Court of NSW against the owner, occupier and/or person in control and command of the unlawful building works seeking mandatory orders for the demolition and/or rectification of the unlawful works;

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- d) after the consideration of any representations in response to a notice of intention, the giving of a statutory Order requiring the unlawful activity to cease or the taking of such other action as may be made the subject of any such Notice or Order
- e) The issue of a penalty notice in accordance with Schedule 5 of the EPAR or other relevantly applicable legislation.
- f) Where applicable, the applicant being required to make application for the issue of a building certificate pursuant to section 149D of the EPAA.

Administrative fees

3.1.15 Pursuant to Councils Management Plan and where the works have been completed within the past twenty four (24) months the maximum fee for assessment of unlawful building works will be equivalent to the maximum fee that may be imposed if the application was for a combined development application / construction certificate application, or a complying development application (whichever is relevant) for the building or part of the building the result of the unauthorised work.

Advice on planning certificates

3.1.16 Notwithstanding any decision taken under this document, Council may, pursuant to s 149(5) of the EPAA and to the extent it sees fit, include advice on a planning certificate with respect to any land where an action or actions have been taken.

3.2 Unlawful building work or other works undertaken in the course of implementing development consents

3.2.1 From time to time building work or other work is carried out which deviates from the development consent ('unlawful work'). Such works will be deemed to be unlawful for the purposes of these Guidelines. In these circumstances, it is envisaged that any deviations are promptly detected by the Council acting as the Principal Certifying Authority (the 'PCA') or by an accredited certifier acting in the capacity as a PCA.

3.2.2 After an initial inspection of the unlawful work and where Council is the nominated PCA, the following things shall be done within 5 working days:

- Issue Notices of Intention to Give an Order No. 12 and/or No. 15 in accordance with the requirements of s 121H of EPAA to the owner of the land and to the principal contractor.

3.2.3 In the case where the Council is not the PCA, within 1 working day the following things shall be done:

- Refer the matter to the private PCA for follow-up action to ensure compliance with the development consent.

Re-inspection

- 3.2.4 Where Council is the PCA a re-inspection of the land shall be carried out upon the expiration of the Notice of Intention. If the re-inspection reveals that the unlawful work is still being carried out unabated either an Order is to be issued as per the provisions of the EPAA or the matter shall be referred to Council's solicitors for appropriate legal action.
- 3.2.5 If the unlawful work continues unabated after the expiry of the Order and no undertakings have been given then the matter shall be referred to Council's solicitors for appropriate legal action.

Requirement to provide particulars and further information

- 3.2.6 On the basis that the unlawful work has ceased the owner or occupier of the land or the principal contractor shall submit representations to Council as per the provisions of the applicable legislation inviting such persons to provide full and frank particulars with respect to the intended nature of the work and the reasons why such work was carried out contrary to the plans authorised under the development consent and issued with the construction certificate.
- 3.2.7 As an alternative to, or in conjunction with 5.2.6, a Council officer(s) holding appropriate delegated authority may pursuant to Section 118B of the EPAA conduct a formal interview with the owner, occupier of the land or the principal contractor who has caused the work to be carried out.
- 3.2.8 In addition to requiring any person to answer questions a Council officer may as per the provisions of Section 118B of the EPAA require any person to furnish information in relation to the matter, the subject of the inspection or investigation.
- 3.2.9 Pursuant to the powers under 118B(d) of the EPAA a Council officer may require the owner, occupier and/or principal contractor who caused the unlawful building works to be carried out to furnish, within such time allowed, information with respect to all or any of the work constructed or otherwise carried out contrary to the plans issued with the construction certificate.

Failure to furnish information

- 3.2.10 Failure to comply with a request for information within the time allowed, will constitute a breach of the EPAA enabling the Council to commence legal action seeking mandatory orders to compel the owner or occupier of the land or person in command and control of the unlawful work to furnish the information required.

Neighbour notification

3.2.11 On the basis that the unlawful work has ceased and the required information pursuant to Section 118B of the EPAA has been received a preliminary assessment shall be carried out to determine the likely and perceived impacts caused by the unlawful work on the occupiers of the immediate adjoining land. If in the opinion of the Council the unlawful work is likely to have an adverse impact then neighbour notification letters shall be sent to each affected adjoining occupier seeking comments in relation to the real and perceived impacts of the unlawful work.

Assessment and enforcement actions

3.2.12 On receipt of any representations, furnished information and any comments from affected neighbours a full assessment shall be carried out to determine an appropriate course of action to remedy the breach to the EPAA. The assessment may result in one or more of the following actions being taken against the owner or occupier of the land or the principal contractor causing the unlawful work:

- a) invite the owner, occupier and/or principal contractor to submit an application pursuant to Section 96(2) of the EPAA to modify the development consent to incorporate the unlawful work;
- b) invite the owner, occupier and/or principal contractor to submit a building certificate application pursuant to Section 149D of the EPAA to regularise the unlawful work;
- c) Class 4 civil enforcement proceedings being commenced in the Land and Environment Court of NSW against the owner, occupier and/or person in control and command of the unlawful building works seeking mandatory orders for the demolition and/or rectification of the unlawful work.
- d) after the consideration of any representations in response to a notice of intention, the giving of an Order pursuant to the table of s 121B of the EPAA requiring the unlawful work to be demolished and/or rectified;
- e) the issue of a penalty notice in accordance with Schedule 5 of the EPAR.
- f) no further action being taken;

Administrative fees

3.2.13 Pursuant to Councils Management Plan and where the works have been completed within the past twenty four (24) months the maximum fee for assessment of unlawful building works will be equivalent to the maximum fee that may be imposed if the application was for a combined development application / construction certificate application, or a complying development application (whichever is relevant) for the building or part of the building the result of the unauthorised work.

Advice on planning certificates

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3.2.14 Notwithstanding any decision taken under this document, Council may, pursuant to s 149(5) of the EPAA and to the extent it sees fit, include advice on a planning certificate with respect to any land where an action or actions have been taken under the Compliance and Enforcement Policy.

4.0 When will Council commence enforcement action?

Council will decide whether to take enforcement action after it has considered, among other things, the following matters:

4.1 The nature and seriousness of the breach

Council will have regard to the impact the unlawful activity is causing on amenity or harm to the environment. If action is required, Council will consider what is reasonable in the circumstances and ensure the action is not disproportionate to the level of harm or damage arising from the breach.

4.2 Balancing of public interest and cost to Council

Council will weigh up the public interest or benefits that will be served against the cost to the Council, and the community, of taking enforcement action.

In considering the 'public interest' Council will have regard to whether the unlawful activity;

- will impact on a significant number of people;
- will impact on disadvantaged or marginalised groups;
- is indicative of a systemic flaw;
- is individual in nature but often occurs;
- has attracted sustained public attention and no alternative resolution is proposed or likely; and
- flouts Council's authority.

Council will also consider whether more effective means of rectifying an unlawful activity are available before formal legal proceedings are initiated. This may include one or a combination of the following:

- Reporting a breach to a professional association; and
- Use of statutory powers such as;
 - granting consent to a relevant application;
 - making an order under the EPAA, LGA or POEO; or
 - issuing a building certificate under the EPAA.

5.0 The available methods of enforcement

If formal proceedings are considered to be the best option, the decision on which court to bring proceedings in will be informed by considerations such as the following:

- Likely cost of proceedings;
- Prospects of recovery of those costs from the respondent or defendant;
- Remedies available;
- Available methods of enforcement; and
- Circumstances of each case.

6.0 The circumstances of each case

Council will in all prosecution and enforcement matters consider the following;

- Whether the unlawful activity has caused a breach which is technical in nature and does not cause harm to amenity or to the environment;
- Whether the unlawful activity is ongoing. If it has ceased, Council must consider the length of time that has expired;
- Whether the unlawful activity has an impact on the natural or built environment and on health, safety and amenity;
- Whether development consent or other approval would have been granted by Council if the appropriate application had been submitted prior to the unlawful activity being undertaken;
- Whether the person(s) who committed the breach has shown contrition and, where possible, has remedied the unlawful activity;
- Whether the person(s) who committed the breach has made submissions to Council that provide reasonable grounds for Council to conclude that the person was under a genuine mistaken belief as to a relevant factual or legal matter;
- Whether the person(s) who committed the breach has shown deliberate or wilful conduct in their actions;
- Whether the person(s) who committed the breach should have been aware of their obligations because they have:
 - particular knowledge, eg, a builder or company that regularly carries out work and is generally aware of the relevant Council or other requirements;
 - received a previous warning; or
 - been subject to previous formal legal action.
- Whether the unlawful activity was unavoidable; and
- Such other matters that may appear to be relevant to the individual case.

7.0 Implementation

These Guidelines comes into effect from the date of adoption by Manly Council of the Compliance and Enforcement Policy and replaces any previously adopted or draft policies or guidelines which may be in existence at the time of its adoption.

The “Compliance and Enforcement Policy” document is associated with this guideline and identifies the strategy and enforcement actions which Council shall undertake based on the nature of the unlawful activity encountered.

Council will assess all compliance and enforcement matters in a timely manner and in accordance with the “Compliance and Enforcement Policy” and “Compliance and Enforcement Guidelines”, relevant legislation and internal procedures.

8.0 Monitoring and Breaches:

Regular monitoring of compliance with the Compliance and Enforcement policy, guidelines and relevant legislation will be undertaken and documented by the responsible officer for these guidelines.

Breaches of these guidelines are considered to be breaches of Manly Council’s Code of Conduct and therefore invoke the relevant sanctions outlined in that Code. Persons in breach of any legislation may be subject to relevant criminal action.

10.0 Guidelines review:

These guidelines are subject to regular review at a maximum interval of two years.

Any recognised change to relevant legislation; or directives or guidelines issued by agencies including the NSW Ombudsman and the Department of Local Government; or to Manly Council’s related guidelines and procedures will activate an immediate review of these guidelines to ensure it remains current and aligned to best practice policies.

11.0 Relevant References & Legislation

Environmental Planning and Assessment Act 1979 (NSW)
Environmental Planning & Assessment Regulation, 2000 (NSW)
Local Government Act 1993 (NSW)
Manly Local Environmental Plan, 1988 (as amended)
Protection of the Environment Operations Act, 1997

12.0 Guidelines History

Minute No	Date of Issue	Action	Author	Checked by
n/a	13 October 2009	First Draft prepared	Manager Corporate Governance	

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SCHEDULE 1

Information to be included in s 118B EPAA and s 192 LGA requests for information

The information furnished must contain the following:

- (a) the name and address of the person submitting the information
- (b) a description of the unlawful development or other activity being carried out,
- (c) the address, and formal particulars of title, of the land on which the unlawful development or other activity has been carried out,
- (d) an indication as to whether the land is, or is part of, critical habitat,
- (e) an indication as to whether any unlawful development is likely to significantly affect threatened species, populations or ecological communities, or their habitats,
- (f) a list of any authorities from which concurrence must be obtained before the unlawful development or other activity was carried out,
- (g) a list of any approvals of the kind referred to in section 91 (1) of the EPAA or otherwise that must be obtained before the development or other activity may lawfully be carried out,
- (h) the estimated cost of the unlawful development or other activity,
- (i) if the person carrying out the unlawful development or activity is not the owner of the land, a statement signed by the owner of the land to the effect that the owner consents to the submission of the information,
- (j) a list of the documents accompanying the information furnished.

2 Documents to be included

- (1) The information submitted must be accompanied by the following documents:
 - (a) a site plan of the land,
 - (b) a sketch of the development or other activity,
 - (c) a statement of environmental effects (in the case of development other than designated development),
 - (d) in the case of development that involves the erection of a building, an A4 plan of the building that indicates its height and external configuration, as erected, in relation to its site (as referred to in clause 56 of this Regulation),
 - (e) an environmental impact statement (in the case of designated development),
 - (f) a species impact statement (in the case of land that is, or is part of, critical habitat or development that is likely to significantly affect threatened species, populations or ecological communities, or their habitats),

if the development involves any subdivision work, preliminary engineering drawings of the work to be carried out,

- (h) if an environmental planning instrument requires arrangements for any matter to have been made before development consent may be granted (such as arrangements for the provision of utility services), documentary evidence that such arrangements have been made,
 - (i) if any development involves a change of use of a building (other than a dwelling-house or a building or structure that is ancillary to a dwelling-house):
 - (i) a list of the Category 1 fire safety provisions that currently apply to the existing building, and
 - (ii) a list of the Category 1 fire safety provisions that are to apply to the building following its change of use,
 - (j) if any development involves building work to alter, expand or rebuild an existing building, a scaled plan of the existing building,
 - (k) in the case of any development to which clause 2A applies, such other documents as any BASIX certificate for the development requires to accompany the application.
- (2) The site plan referred to in subclause (1) (a) must indicate the following matters:
- (a) the location, boundary dimensions, site area and north point of the land,
 - (b) existing vegetation and trees on the land,
 - (c) the location and uses of existing buildings on the land,
 - (d) existing levels of the land in relation to buildings and roads,
 - (e) the location and uses of buildings on sites adjoining the land.
- (3) The sketch referred to in subclause (1) (b) must indicate the following matters:
- (a) the location of any buildings or works (including extensions or additions to existing buildings or works) in relation to the land's boundaries and adjoining development,
 - (b) floor plans of any buildings showing layout, partitioning, room sizes and intended uses of each part of the building,
 - (c) elevations and sections showing proposed external finishes and heights of any buildings,
 - (d) finished levels of the land in relation to existing and proposed buildings and roads,
 - (e) parking arrangements, entry and exit points for vehicles, and provision for movement of vehicles within the site (including dimensions where appropriate),
 - (f) landscaping and treatment of the land (indicating plant types and their height and maturity),
 - (g) methods of draining the land,
 - (h) in the case of development to which clause 2A applies, such other matters as any BASIX certificate for the development requires to be included on the sketch.

- (4) A statement of environmental effects referred to in subclause (1) (c) must indicate the following matters:
- (a) the environmental impacts of the development,
 - (b) how the environmental impacts of the development have been identified,
 - (c) the steps to be taken to protect the environment or to lessen the expected harm to the environment,
 - (d) any matters required to be indicated by any guidelines issued by the Director-General for the purposes of this clause.
- (5) In addition, a statement of environmental effects referred to in subclause (1) (c) must include the following, if the unlawful development relates to residential flat development to which State Environmental Planning Policy No 65—Design Quality of Residential Flat Development applies:
- (a) an explanation of the design in terms of the design quality principles set out in Part 2 of State Environmental Planning Policy No 65—Design Quality of Residential Flat Development,
 - (b) drawings of the development in the context of surrounding development, including the streetscape,
 - (c) development compliance with building heights, building height planes, setbacks and building envelope controls (if applicable) marked on plans, sections and elevations,
 - (d) drawings of the landscape area, including species selected and materials to be used, presented in the context of the proposed building or buildings, and the surrounding development and its context,
 - (e) if the development is within an area in which the built form is changing, statements of the existing and likely future contexts,
 - (f) photomontages of the development in the context of surrounding development,
 - (g) a sample board of the materials and colours of the facade,
 - (h) detailed sections of facades,
 - (i) if appropriate, a model that includes the context.
- (6) In the case of development to which clause 2A applies, the explanation referred to in subclause (5) (a) need not deal with the design quality principles referred to in that paragraph to the extent to which they aim:
- (a) to reduce consumption of mains-supplied potable water, or reduce emissions of greenhouse gases, in the use of the building or in the use of the land on which the building is situated, or
 - (b) to improve the thermal performance of the building.

Manly Council

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Compliance and
Enforcement Policy
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Title: Compliance and Enforcement Policy

Policy No: MAN-POL-03

Keywords: Compliance, Enforcement, unlawful activities, breaches of EPAA,
unlawful development

Responsible
Officer: Manager Compliance and Enforcement

1.0 Policy Statement

Manly Council acknowledges that it has an obligation under **section 8** of the **Local Government Act 1993** to ensure that Council exercises its regulatory powers are carried out consistently and without bias.

Council acknowledges its obligations under the OH&S Act in relation to its officers.

The Policy applies to all compliance and enforcement action that Manly Council has regulatory responsibility under New South Wales legislation. It applies to Council staff and its contractors, who must out their duties lawfully and replaces any previously adopted or draft policies which may be in existence at the time of its adoption.

Council's *Customer Service Charter* and as expressed in its *Management Plan* is of *openness; equity; integrity; efficiency; service delivery and respect* that apply to all actions taken under this Policy.

2.0 Purpose:

This policy has been formulated to provide a sound and fair basis with respect to how Manly Council, as the responsible authority, acts promptly, consistently and effectively so as to manage unlawful activities with a view to ensuring, so far as is practicable, compliance with the law and, in the case of the carrying out of unlawful development, reflecting the planning objectives of the *Environmental Planning and Assessment Act 1979 (NSW)* (the 'EPAA'), any *Environmental Planning Instrument* (an 'EPI') and the *Local Government Act 1993 (NSW)* (the 'LGA').

Insofar as the carrying out of unlawful development is concerned, s 5 of the EPAA states that the objects of the EPAA are to encourage:

- (i) the proper management, development and conservation of natural and artificial resources, including agricultural land, natural areas, forests, minerals, water, cities, town and villages for the purposes of promoting the social and economic welfare of the community and a better environment;
- (ii) the promotion and co-ordination of the orderly and economic use and development of land;

3.0 Objectives:

The objectives of this policy are to:

- assess unlawful activities against statutory and non-statutory planning or other relevantly applicable objectives;
- provide a framework to facilitate Council's decisions making in regards to enforcement action and prosecuting of breaches of the relevantly applicable legislation;
- manage unlawful activities by providing the opportunity for public participation with respect to the impacts caused by such activities;
- provide any person responsible for carrying out any unlawful activity an opportunity to make representations to Council in accordance with administrative law principles of 'procedural fairness' and 'natural justice';
- ensure that Council acts consistently when exercising investigative and enforcement functions;
- initiate appropriate actions to remedy breaches of the EPAA or other relevantly applicable legislation; and
- provide the community with information and guidance with respect to the Council's role in the management of unlawful activities.

4.0 Scope:

This document applies to all land within the Manly Council Local Government Area as shown on the *Manly Local Environmental Plan 1988 (the 'MLEP')* map.

5.0 Community Participation:

Where appropriate community participation will be encouraged for investigations conducted in respect to any unlawful development.

Manly Council will approach any investigation of unlawful activity on a 'case by case' basis. By taking this approach, Council will assess the impacts of unlawful activity against the public interest and will also weigh the cost involved to the Council to implement enforcement strategies relative to the benefits to be derived from taking such action.

6.0 What is an unlawful activity:

An **unlawful activity** is the doing of any act, matter or thing, or the carrying out of any activity of any kind, that is:

- contrary to a legislative provision regulating a particular activity or work;

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- contrary to an environmental planning instrument that regulates the activities or work that can be carried out on particular land;
- without a required development consent, approval, permit or licence; and/or
- contrary to the terms or conditions of a development consent, approval, permit or licence,

and includes but is not limited to the carrying out of unlawful development within the meaning of the EPAA and the carrying out of any activity under s 68 of the LGA without the prior approval of Council having been obtained.

The **unlawfulness** of any activity is determined objectively by reference to the relevantly applicable legislation. In the case of unlawful development, regard is to be had to the EPAA, the Regulation or any EPI as to whether such development can only be implemented with or without 'development consent'. Unlawfulness is also determined against the criteria of 'Exempt Development' and 'Complying Development' as prescribed by the MLEP .

7.0 Definitions:

Building Certificate	A building certificate is issued as per the provisions of S 149 of the EPAA and operates to prevent the Council - a. from making an order (or taking proceedings for the making of an order or injunction) under the Environmental Planning & Assessment Act or the Local Government Act requiring the <u>building</u> to be repaired, demolished, altered, added to or rebuilt, and b. from taking proceedings in relation to any encroachment by the <u>building</u> onto <u>land</u> vested in or under the <u>control</u> of the Council
Development	'development' means: a. the use of land, and b. the subdivision of land c. the erection of a building; d. the carrying out of a work; e. the demolition of a building or work; f. any other act, matter of thing referred to in s 26 [of the EPAA] that is controlled by an an EPI, but does not include any development of a class or description prescribed by the regulations [<i>Environment Planning and Assessment Regulation, 2000 (NSW)</i>] (the 'EPAR') for the purposes of this definition.
EPAA	The Environmental Planning & Assessment Act, 1979, sets out the framework for local planning in New South Wales
EPAR	The Environmental Planning & Assessment Regulation supports the general aims of the EP&A Act in the regulatory process.
EPI	Environmental Planning Instrument' ('EPI') is any State Environmental Planning Policy, Regional Environmental Plan or the Manly Local Environmental Plan, 1988 (the 'MLEP').
Exempt Development	Exempt development is development that is of minimal environmental impact and does not require development approval.

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MLEP	Manly Local Environmental Plan, 1988 (as amended) is a specific planning control for the Manly area which is administered by Manly Council. This plan applies to all land within the Municipality of Manly as shown on the MLEP map.
POEO	The <i>Protection of the Operations Act 1997</i> (POEO Act) is the key piece of environment protection legislation administered by Council.
PCA	Principal Certifying Authority is an accredited authority who issues certificates for development under the Environmental Planning and Assessment Act 1979
Unlawful activity	An unlawful activity is the doing of any act, matter or thing, or the carrying out of any activity of any kind, that is: <ul style="list-style-type: none"> • contrary to a legislative provision regulating a particular activity or work; • contrary to an environmental planning instrument that regulates the activities or work that can be carried out on particular land; • without a required development consent, approval, permit or licence; and/or • contrary to the terms or conditions of a development consent, approval, permit or licence, and includes but is not limited to the carrying out of unlawful development within the meaning of the <i>Environmental Planning and Assessment Act 1979</i> (NSW) (the 'EPAA') and the carrying out of any

8.0 Implementation

This Policy comes into effect from the date of Adoption by Manly Council and replaces any previously adopted or draft policies which may be in existence at the time of its adoption.

The "Compliance and Enforcement Guidelines" document associated with this policy identifies the strategy and enforcement actions which Council shall undertake based on the nature of the unlawful activity encountered.

Council will assess all compliance and enforcement matters in a timely manner and in accordance with the "Compliance and Enforcement Guidelines", relevant legislation and internal procedures.

9.0 Monitoring and Breaches:

Regular monitoring of compliance with this policy, relevant legislation and Manly policies, procedures and guidelines will be undertaken and documented by the responsible officer for this policy.

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Breaches of this policy are considered to be breaches of Manly Council's Code of Conduct and therefore invoke the relevant sanctions outlined in that Code. Persons in breach of any legislation may be subject to relevant criminal action.

10.0 Policy review:

This policy is subject to regular review at a maximum interval of two years.

Any recognised change to relevant legislation; or directives or guidelines issued by agencies including the NSW Ombudsman and the Department of Local Government; or to Manly Council's related guidelines and procedures will activate an immediate review of this policy to ensure it remains current and aligned to best practice policies.

11.0 Relevant References & Legislation

Environmental Planning and Assessment Act 1979 (NSW)
 Environmental Planning & Assessment Regulation, 2000 (NSW)
 Local Government Act 1993 (NSW)
 Manly Local Environmental Plan, 1988 (as amended)
 Protection of the Environment Operations Act, 1997

12.0 Policy History

Minute No	Date of Issue	Action	Author	Checked by
n/a	20 October 2008	First Draft prepared	Consultant Solicitor	Manager Compliance and Enforcement
	13 October 2009	Second Draft	Manager Corporate Governance	